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INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

XV. SETTLEMENT OF DISPUTES

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[Editorial note: The present draft chapter is a revision of draft chapter XV, "Settlement of disputes", published as document A/CN.9/WG.IV/WP.51/Add.6. The note in square brackets at the beginning of each paragraph indicates either the number under which the paragraph appeared in document A/CN.9/WG.IV/WP.51/Add.6 or that the paragraph is new. The revisions of paragraphs that appeared in document A/CN.9/WG.IV/WP.51/Add.6 are underlined. An asterisk indicates the place where text has been deleted without adding new language.]

A. General remarks

1. [1] Disputes may arise in a countertrade transaction with respect to the countertrade agreement, and with respect to the supply contracts concluded pursuant to the countertrade agreement. It is advisable that the parties agree on the manner in which any future disputes arising out of the countertrade agreement and the related supply contracts are to be settled.

2. [2] In general, it is desirable for the parties initially to attempt to settle their disputes through negotiation (section B). If negotiation is not successful, the parties might wish to refer their dispute to an independent conciliator, who is to make recommendations to the parties on how to settle the dispute (section C). If those methods of dispute settlement fail, there are basically two methods available of obtaining a binding decision: arbitration and judicial proceedings. Arbitration is a process by which parties refer disputes that might arise between them or that have already arisen for decision by an arbitral tribunal composed of one or more impartial persons (arbitrators) selected by them (section D). Arbitral proceedings may be initiated only on the basis of an arbitration agreement. In general, the parties are obligated to accept the decision of the arbitral tribunal (arbitral award) as final and binding. The arbitral award is usually enforceable in a manner similar to a court decision. In the absence of an arbitration agreement, disputes between the parties will have to be settled in judicial proceedings (section E).

3. [3] This chapter does not deal with procedures agreed upon by the parties for determining terms of a supply contract that have been left open in the countertrade agreement. Such methods include procedures to be observed by the parties in negotiating supply contract terms, standards and guidelines to be used in setting the terms, designation of a third person to determine a contract term, or authorizing one of the parties to determine a contract term within agreed parameters. Such methods are discussed generally in chapter IV, "Countertrade commitment", paragraphs 38 to 60, and with respect to specific types of contract terms in chapter VI, "Type, quality and quantity of goods", paragraphs 25, 26, 34, 39, and chapter VII, "Pricing of goods", paragraphs 11 to 47.

4. [4] The implementation of a countertrade transaction usually includes ongoing discussions between the parties that may permit many problems and misunderstandings to be resolved without recourse to dispute settlement proceedings. If such discussions result in an amendment of the countertrade agreement or of a supply contract, it is advisable to express the agreement in writing (see chapter V, "General remarks on drafting", paragraphs 3 to 5).

5. [5] When the parties embody all of their contractual obligations in the two directions in a single contract (see chapter III, "Contracting approach", paragraphs 2 to 10), a broadly worded dispute settlement clause in that contract would, in the absence of a contrary provision, govern all disputes arising from the contract. However, usually the parties embody their obligations in the two directions in more than one contract (see chapter III, paragraphs 11 to 23). In multi-contract countertrade transactions, the parties may consider it useful to agree that all of the supply contracts, a contract by which a third party is engaged to purchase or to supply goods, as well as the countertrade agreement, are subject to one dispute settlement clause.

6. [5] When the countertrade agreement provides for the future conclusion of supply contracts, the parties may stipulate in the countertrade agreement that all of those contracts are to be subject to a particular method of dispute settlement. In this way the countertrade agreement may settle an issue that would otherwise be addressed in each supply contract.

7. [new paragraph] ~~In some States restrictions exist as to the freedom of a State agency or some other entity of the State to conclude an arbitration agreement or to agree to the jurisdiction of a court of a foreign State. The right to enter into such dispute settlement clauses may be limited to certain types of transactions or to transactions with a foreign party, or such clauses may be subject to an authorization. It is advisable for the parties to investigate dispute settlement aspects in such cases in order to be assured that they are free to enter into a binding dispute settlement clause.~~

B. Negotiation

8. [6] The most satisfactory method of settling a dispute between parties is usually reaching an amicable settlement of the dispute by negotiation between the parties. An amicable settlement may avoid disruption of the business relationship between the parties. In addition, it may save the parties the considerable cost and the greater amount of time that are normally required for the settlement of disputes by other means. Furthermore, negotiation may be a particularly attractive approach in long-term countertrade transactions in which the countertrade agreement indicates the terms of the future supply contracts in a general rather than in a specific manner.

9. [7] Even though the parties may wish to attempt to settle their disputes through negotiation before invoking other means of dispute settlement, it may not be desirable for the dispute settlement clause to prevent a party from resorting to other means of settlement until a period of time allotted for negotiation has expired. If the clause stipulates that other dispute settlement proceedings may not be initiated during the negotiation period, it is advisable to permit a party to initiate other proceedings even before the expiry of that period in certain cases, e.g., where a party states in the course of negotiations that it is not prepared to negotiate any longer, or where the initiation of arbitral or judicial proceedings before the expiry of the negotiation period is needed in order to prevent the loss or prescription of a right. It is advisable to require a settlement reached through negotiation to be reduced to writing.

10. [8] Since the outcome of a dispute between two parties to a countertrade transaction might affect the interests of another party to the countertrade transaction, it might be agreed that the party not directly involved in a dispute should be permitted to participate in the negotiations. Such a situation may arise when a third party is engaged to purchase countertrade goods and the dispute occurs between the third party and the supplier. In this case the party originally committed to purchase goods may be liable for payment of an agreed sum in the event that the intended purchase by the third party fails to take place and the countertrade commitment is not fulfilled. Similarly, a party committed to supply who engages a third-party supplier may have an interest in the outcome of the dispute between the third-party supplier and the purchaser. The right to such participation in the negotiation of a settlement may be limited to the case in which the party that engages the third party remains liable for the fulfilment of the countertrade commitment. In the case of a multi-party countertrade transaction, it may be agreed that all parties to the transaction would participate in the negotiations.

11. [9] In long-term countertrade transactions, the parties may establish a joint committee to coordinate and monitor implementation of the countertrade transaction (see chapter IV, "Countertrade commitment", paragraph 64). Such a committee may permit the parties to detect possible sources of difficulties and disputes at an early stage and may be an appropriate vehicle for settling disputes through negotiation.

C. Conciliation

12. [10] If the parties fail to settle a dispute through negotiation, they may wish to attempt to do so through conciliation before resorting to arbitral or judicial proceedings. The object of conciliation is to achieve an amicable settlement of the dispute with the assistance of a neutral conciliator respected by both parties. In contrast to an arbitrator or judge, the conciliator does not decide a dispute; rather, the conciliator assists the parties in reaching an agreed settlement, often by proposing solutions for their consideration.

13. [11] Conciliation is non-adversarial and confidential. The parties are more likely to preserve the good business relationship that exists between them than in arbitral or judicial proceedings. Conciliation may even improve the relationship between the parties, since the scope of the conciliation and the ultimate agreement of the parties may go beyond the strict confines of the dispute that gave rise to the conciliation. Conciliation may also permit the participation in the settlement of the dispute of parties that are not directly involved in the dispute but who have an interest in the outcome of the dispute. On the other hand, a potential disadvantage of conciliation is that, if the conciliation were to fail, the money and time spent on it would be wasted. * It is advisable that, before initiating conciliation, the parties consider carefully whether there exists a real likelihood of reaching a settlement.

14. [12] If the parties provide for conciliation, they will have to settle a number of issues for the conciliation to be effective. It is not feasible to settle all of those issues in the body of the countertrade agreement; rather, the parties may incorporate into their agreement by

reference a set of conciliation rules prepared by an international organization, such as the UNCITRAL Conciliation Rules. 1/

15. [13] It is often advisable to commence conciliation proceedings before resorting to arbitral or judicial proceedings. If during conciliation proceedings arbitral or judicial proceedings have been initiated, the parties might still find it useful to continue with the conciliation. Conciliation may also be initiated after the commencement of arbitral or judicial proceedings.

D. Arbitration

16. [14] There are various reasons why arbitration is frequently used for settling disputes arising in countertrade transactions. Arbitral proceedings may be structured by the parties so as to be less formal than judicial proceedings and better suited to the needs of the parties and to the specific features of the disputes likely to arise under the countertrade agreement or a related contract. The parties can choose as arbitrators persons who have expert knowledge of the subject-matter in dispute. The parties may choose the place where the arbitral proceedings are to be conducted. They may also choose the language or languages to be used in the arbitral proceedings. In addition, the parties can choose the applicable law, and that choice will almost always be respected by the arbitral tribunal; the same is not always true of judicial proceedings (see chapter XIV, "Choice of law", paragraph 12). Where parties agree to arbitration, neither party submits to the courts of the country of the other party. Arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings. The proceedings and arbitral awards can be kept confidential, while judicial proceedings and decisions usually cannot. Arbitral proceedings tend to be more expeditious and may be less costly than judicial proceedings. It may be noted, however, that some States provide for summary judicial proceedings for disputes involving a sum of money that does not exceed a certain amount. Under some national laws, an arbitral tribunal may have more latitude than a court to grant to the claimant the remedy of specific performance. Finally, as a result of international conventions that assist in the recognition and enforcement of foreign arbitral awards, those awards are frequently recognized and enforced more easily than foreign judicial decisions. One such convention to which many States are parties is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). 2/

17. [15] On the other hand, an arbitral award may be set aside in judicial proceedings. The initiation of those proceedings will delay the final settlement of the dispute. However, under many legal systems, an arbitral award may be set aside only on a limited number of grounds, for example that the arbitral tribunal lacked authority to decide the dispute, that a party could not present its case in the arbitral proceedings, that the rules applicable to the appointment of arbitrators or to the arbitral procedure were not complied with, or that the award was contrary to public policy. It may also be noted that, in some States, it is not possible for parties to preclude courts from settling certain types of disputes. In addition, a court may award and enforce to a broader extent than an arbitral tribunal provisional measures of protection or injunctions.

1. Scope of arbitration agreement and mandate of arbitral tribunal

18. [16] In general, arbitral proceedings may be conducted only on the basis of an agreement by the parties to arbitrate. The agreement may be reflected either in an arbitration clause included in the countertrade agreement or a related contract, or in a separate arbitration agreement concluded by the parties before or after a dispute has arisen. Since it may be more difficult to reach an agreement to arbitrate after a dispute has arisen, it is advisable to enter into an arbitration agreement at the outset of the countertrade transaction. However, under some legal systems, an agreement to arbitrate is procedurally and substantively effective only if it is concluded or confirmed after a dispute has arisen.

19. [17] The arbitration agreement should indicate what disputes are to be settled by arbitration. For example, the arbitration clause may stipulate that all disputes arising out of or relating to the countertrade agreement or the breach, termination or invalidity thereof are to be settled by arbitration. In some cases, the parties may wish to exclude from that wide grant of jurisdiction certain disputes that they do not wish to be settled by arbitration.

20. [18] If permitted under the law applicable to the arbitral proceedings, the parties may wish to authorize the arbitral tribunal to order interim measures pending the final settlement of a dispute. However, under some legal systems arbitral tribunals are not empowered to order interim measures. Under other legal systems where interim measures of protection can be ordered by an arbitral tribunal, they cannot be enforced; in those cases it may be preferable for the parties to rely on a court to order interim measures. Under many legal systems a court may order interim measures even if the dispute is to be or has been submitted to arbitration.

21. [19] It is desirable for the arbitration agreement to obligate the parties to implement arbitral decisions, including decisions ordering interim measures. The advantage of including such an obligation in the agreement is that under some legal systems, where an arbitral award is not enforceable in the country of a party, a failure by the party to implement an award when obligated to do so by the agreement might be treated in judicial proceedings as a failure by the party to perform a contractual obligation.

22. [20] If judicial proceedings are instituted in respect of a dispute that is covered by a valid arbitration agreement, upon a timely request the court will normally refer the dispute to arbitration. However, the court may retain the authority to order interim measures and will normally be entitled to control certain aspects of arbitral proceedings (e.g., to decide on a challenge to arbitrators) and to set aside arbitral awards on certain grounds (see above, paragraph 17).

23. [21] Parties that are considering authorizing the arbitral tribunal to decide disputes ex aequo et bono or to act as amiable compositeur should bear in mind that arbitrators are not permitted to do so under some legal systems. In addition, such authorizations may be interpreted in different ways and lead to legal insecurity. For example, the terms might be interpreted as authorizing the arbitral tribunal to be guided either only by principles of fairness, justice or equity, or, in addition, by those provisions of the applicable law regarded in the legal system of that law as

fundamental. If the parties wish to authorize the arbitral tribunal to decide disputes without applying all legal rules of a State, they may wish to specify the standards or rules according to which the arbitral tribunal is to decide the substance of the dispute. Moreover, in order to avoid any misunderstanding, the parties may wish to make it clear that the arbitral tribunal is to decide in accordance with the terms of the supply contract or the countertrade agreement and the relevant usages of trade applicable to the transaction.

2. Type of arbitration and appropriate procedural rules

24. [22] The parties are able to select the type of arbitration that best suits their needs. It is desirable that they agree on appropriate rules to govern their arbitral proceedings. There is a wide range of arbitration systems available, with varying degrees of involvement of permanent bodies (e.g., arbitration institutions, courts of arbitration, professional or trade associations and chambers of commerce) or third persons (e.g., presidents of courts of arbitration or of chambers of commerce). At one end of the spectrum is the pure ad hoc type of arbitration, which does not involve a permanent body or third person in any way. This means, in practical terms, that no outside help is available (except, perhaps, from a national court) if, for example, difficulties are encountered in the appointment or challenge of an arbitrator. Moreover, any necessary administrative arrangements have to be made by the parties or the arbitrators themselves. At the other end of the spectrum there are arbitrations fully administered and supervised by a permanent body, which may review terms of reference and the draft award and may revise the form of the award and make recommendations as to its substance.

25. [23] Between these two types of arbitration there is a considerable variety of arbitration systems, all of which involve an appointing authority but differ as to the administrative services that they provide. The essential, although not necessarily exclusive, function of an appointing authority is to compose or assist in composing the arbitral tribunal (e.g., by appointing the arbitrators, deciding on challenges of an arbitrator or replacing an arbitrator). Administrative or logistical services, which may be offered as a package or separately, could include the following: forwarding written communications of a party or the arbitrators; assisting the arbitral tribunal in establishing and notifying the date, time and place of hearings and other meetings; providing, or arranging for, meeting rooms for hearings or deliberations of the arbitral tribunal; arranging for stenographic transcripts of hearings and for interpretation during hearings and possibly translation of documents; assisting in filing or registering the arbitral award, when required; holding deposits and administering accounts relating to fees and expenses; and providing other secretarial or clerical assistance.

26. [24] Unless the parties opt for pure ad hoc arbitration, they may wish to agree on the body or person to perform the functions that they require. Among the factors worthwhile considering in selecting an appropriate body or person are the following: willingness to perform the required functions; competence, in particular in respect of international matters; appropriateness of fees measured against the extent of services requested; seat or residence of the body or person and possible restriction of its services to a particular geographic area. The latter point should be viewed in conjunction with the probable or agreed place of arbitration (see below, paragraphs 35 to 39). However, certain functions (e.g., appointment) need not

necessarily be performed at the place of arbitration, and certain arbitral institutions are prepared to provide services in countries other than those where they are located.

27. [25] In most cases, the arbitral proceedings will be governed by the procedural law of the State where the proceedings take place. Many States have laws regulating various aspects of arbitral proceedings. Some provisions of these laws are mandatory; others are non-mandatory. In selecting the place of arbitration, the parties may wish to consider the extent to which the law of a place under consideration recognizes the special needs and features of international commercial arbitration and, in particular, whether it is sufficiently liberal to allow the parties to tailor the procedural rules to meet their particular needs and wishes while at the same time ensuring that the proceedings are fair and efficient. A recent trend in this direction, discernible from modern legislation in some States, is being enhanced and fortified by the UNCITRAL Model Law on International Commercial Arbitration. 3/ The UNCITRAL Model Law is becoming increasingly accepted by States of different regions and different legal and economic systems.

28. [26] Since the procedural rules in the arbitration laws of some States are not necessarily suited to the particular features and needs of international commercial arbitration, and since, in any case, those laws do not contain rules settling all procedural questions that may arise in relation to arbitral proceedings, the parties may wish to adopt a set of arbitration rules to govern arbitral proceedings under their agreement. When the parties choose to have their arbitrations administered by an institution, the institution may require the parties to use the rules of that institution, and may refuse to administer a case if the parties have modified provisions of those rules that the institution regards as fundamental to its arbitration system. Most arbitral institutions, however, offer a choice of two or sometimes more sets of rules and often allow the parties to modify any of the rules. If the parties are not required by an institution to use a particular set of arbitration rules or to choose among specified sets of rules, or if they choose ad hoc arbitration, they are free to choose a set of rules themselves. In selecting a set of procedural rules, the parties may wish to consider its suitability for international cases and the acceptability of the procedures contained in them.

29. [27] Of the many arbitration rules promulgated by international organizations or arbitral institutions, the UNCITRAL Arbitration Rules 4/ deserve particular mention. These Rules have proven to be acceptable in the various legal and economic systems and are widely known and used in all parts of the world. Parties may use them in pure ad hoc arbitrations as well as in arbitrations involving an appointing authority with or without the provision of additional administrative services. A considerable number of arbitration institutions in all regions of the world have either adopted these Rules as their own institutional rules for international cases or have offered to act as appointing authority in conjunction with the use of those Rules. Most of them will provide administrative services in cases conducted under the UNCITRAL Arbitration Rules.

30. [28] Where a model clause accompanies the arbitration rules to govern arbitrations under the countertrade agreement or is suggested by an arbitral institution, adoption of that clause by the parties may help to enhance the certainty and effectiveness of the arbitration agreement. Some model clauses, such as the one accompanying the UNCITRAL Arbitration Rules, invite the

parties to settle certain practical matters by agreement. These include the involvement of an appointing authority, as well as the number of arbitrators (see below, paragraphs 31 to 33), the appointment of arbitrators (see below, paragraph 34), the place of arbitration (see below, paragraphs 35 to 39) and the language or languages to be used in the arbitral proceedings (see below, paragraphs 40 and 41). 5/ [new footnote]

3. Number of arbitrators

31. [29] The parties may wish to specify in the arbitration clause the number of arbitrators who are to comprise the arbitral tribunal. If the parties fail to do so, the chosen arbitration rules or, in some cases, the law applicable to the arbitral proceedings will either specify that number or the manner by which it is to be determined. Agreement by the parties on the number of arbitrators will enable the parties to ensure that the number conforms to their particular needs and wishes, and will provide certainty in respect of that aspect of the appointment process. However, parties should be aware that some national laws restrict their freedom to agree upon the number of arbitrators by, for example, prohibiting an even number of arbitrators.

32. [30] Other than the possible legal restriction just referred to, the considerations that may be relevant to the question of the number of arbitrators are essentially of a practical nature. In order to ensure the efficient functioning of the arbitral proceedings and the taking of decisions, it is usually desirable to specify an uneven number, i.e., one or three, although in practice parties sometimes specify two-member panels, coupled with a mechanism for involving a third arbitrator, "umpire" or "referee", to overcome any impasse between the two.

33. [31] As to whether one or three arbitrators should be specified, the parties may wish to consider that arbitral proceedings conducted by a sole arbitrator are generally less costly and tend to be more expeditious than proceedings where the fees of three arbitrators have to be paid and where three time-schedules have to be accommodated. On the other hand, three arbitrators may bring a wider range of expertise and background to the proceedings. Since the desirable expertise and background can be of different types, different methods of appointing the arbitrators may be envisaged.

4. Appointment of arbitrators

34. [32] On the one hand, in an international case, each party may want to have one arbitrator of its choice who would be familiar with the economic and legal environment in which that party operates. Therefore, the parties might agree on a method by which each party appoints one arbitrator and the third arbitrator is chosen by the two thus appointed or by an appointing authority. On the other hand, in complex disputes involving legal, technical and economic issues, it may be of considerable advantage to have arbitrators with different qualifications and expertise in the relevant fields. Where parties attach particular importance to this aspect, they may wish to entrust an appointing authority with the appointment of all three arbitrators and, possibly, specify the qualifications or expertise required of the arbitrators.

5. Place of arbitration

35. [33] The parties may wish to specify in the arbitration agreement the place where the proceedings are to be held and where the arbitral award is to be issued. The selection of an appropriate place of arbitration may be crucial to the functioning of the arbitral process and to the enforceability of the arbitral award. The following considerations may be relevant to the selection of the place of arbitration.

36. [34] Firstly, the parties may consider it desirable to choose a place of arbitration such that an award issued in that place would be enforceable in the countries where the parties have their places of business or substantial assets. In many States, foreign awards are readily enforceable only by virtue of multilateral or bilateral treaties, and often only on the basis of reciprocity. In some States enforcement is available on the basis of legislation providing for the reciprocal enforcement of awards made in certain other States. The parties may thus wish to choose a place of arbitration in a State that is in such a treaty relationship, or has reciprocal legislative arrangements, with the States where enforcement might later be sought.

37. [35] Secondly, the parties may consider it desirable to choose a place where the arbitration law provides a suitable legal framework for international cases. Some arbitration laws might be inappropriate because, for example, they unduly restrict the autonomy of the parties or fail to provide a comprehensive procedural framework to ensure efficient and fair proceedings.

38. [36] Considerations of a more practical nature include the following: the convenience of the parties and other persons involved in the proceedings; the availability of necessary facilities, including meeting rooms, support services and communication facilities; the availability of administrative services of an arbitral institution or chamber of commerce, if so desired by the parties; relevant costs and expenses, including expenses for travel, accommodation, meeting rooms and support services; the ability of the parties' counsel to represent the parties without the need to retain local lawyers. Another relevant consideration is that it may be advantageous for the arbitral proceedings to be held in a place which is near to the subject-matter in dispute.

39. [37] Yet other considerations often lead parties to agree on a place other than in the States where they have their places of business. For example, the parties may select a third State because each party may have misgivings about arbitrating in the other party's country; a party in whose State the proceedings are conducted might be thought by the other party to benefit from a familiar legal and psychological environment and from other circumstances facilitating the presentation of the case.

6. Language of proceedings

40. [38] The parties may also wish to specify the language to be used in the arbitral proceedings. The choice of the language may influence the efficiency with which the proceedings are conducted and the cost of the proceedings. Whenever possible, it is desirable to specify a single language, such as the language in which the documents related to the transaction are written. When more than one language is specified, the costs of translation

and interpretation from one language to the other are usually considered to be part of the costs of arbitration and apportioned in the same way as the other costs of arbitration.

41. [39] The parties may wish to specify the types of documents or communications that must be submitted in or translated into the specified language. They may, for example, require the written pleadings, oral testimony at a hearing, and any award, decision or other communication of the arbitral tribunal to be in the specified language. The tribunal may be given the discretion to decide whether and to what extent documentary evidence should be translated. Such discretion may be appropriate in view of the fact that documents submitted by the parties may be voluminous and that only a part of a document may be relevant to a dispute.

E. Judicial proceedings

42. [40] Disputes that are not settled through negotiation or conciliation will, if the parties do not agree to arbitration, have to be settled in judicial proceedings. Courts of two or more countries may be competent to decide a given dispute between the parties, and in some cases the manner in which a dispute is decided depends upon which court decides the dispute. For example, the validity and effect of a choice by the parties of the applicable law will depend upon the rules of private international law in the country of the court deciding the dispute (see chapter XIV, "Choice of law", paragraph 12).

43. [41] The uncertainties that arise when more than one court is competent to decide a dispute may be reduced by an exclusive jurisdiction clause, obligating the parties to submit disputes that arise between them to a specified court in a specified place in a specified country. However, the parties should bear in mind that, under many legal systems, a clause conferring exclusive jurisdiction on a court is valid only if the selected court would, in the absence of the choice-of-jurisdiction clause, have authority to decide the type of dispute that is submitted to it under the clause. Therefore, in selecting a court, the parties should ascertain that the court is legally competent to decide the types of disputes that are to be submitted to it. It is advisable for the clause to specify a court in the selected country, rather than to refer simply to "a competent court" in that country, in order to avoid questions as to which court was to decide a given dispute. The clause may stipulate the types of disputes that are subject to it in a manner similar to the specification in an arbitration agreement (see above, paragraph 19).

44. [42] In referring disputes to the courts of a particular State, the parties should bear in mind the extent to which a judicial decision made in that State would be enforceable in the countries of the parties, or in any other country in which enforcement may be sought (see above, paragraph 36).

45. [43] While an exclusive jurisdiction clause may reduce uncertainties with respect to matters such as the applicable law and the enforceability of a decision, and may facilitate the multi-party settlement of disputes (see below, paragraphs 50 to 53), it may also have certain disadvantages. If a court in the country of one of the parties is given exclusive jurisdiction, and the exclusive jurisdiction clause is invalid under the law of the country

of the selected court, but valid under the law of the country of the other party, difficulties may arise in initiating judicial proceedings in either of the countries. Difficulties connected with initiating judicial proceedings may be magnified if the parties confer exclusive jurisdiction on a court in a third country.

F. Multi-contract and multi-party dispute settlement

46. [44] Countertrade transactions often involve several contracts in the two directions, in addition to the countertrade agreement. In such multi-contract transactions, the parties may wish to consider whether it would be desirable to agree on a single body for the settlement of all disputes that may arise in the transaction, i.e., the same conciliator, arbitral tribunal or court. If disputes are to be settled judicially, the parties may wish to confer exclusive jurisdiction on a particular court (see above, paragraphs 43 to 45). If the parties opt for arbitration or conciliation, they may wish to agree that the arbitral tribunal or conciliator appointed to settle the first dispute that arises will also be appointed to settle any subsequent disputes that may arise in the countertrade transaction.

47. [45] The selection of a single body to settle disputes would be useful when the disputes to be resolved raise similar questions of fact or law. This may promote economy and efficiency in dispute settlement, facilitate consolidation of dispute settlement proceedings, and lessen the possibility of inconsistent decisions. Even if disputes that may arise under the countertrade transaction do not all raise similar questions of law or fact, the selection of a single dispute settlement body may be advantageous because it may allow the parties to reduce the cost of legal advice and facilitate administration of the transaction.

48. [46] There may, however, be circumstances in which the parties agree to the submission of disputes under a given supply contract to a particular dispute settlement body, but decide to submit disputes under other contracts to a different body. Such circumstances may exist, for example, when it is customary in the practice of the parties or in the trade, or it is required by mandatory rules, that a particular supply contract be submitted to a particular dispute settlement method or body, and the parties do not wish to submit the other contracts in the transaction to that same method or body.

49. [47] The possibility of disputes under more than one contract involving similar questions of fact or law may exist in a number of situations. One such situation is when the subject-matter of the supply contracts in one direction is related to the subject-matter of the supply contracts in the other direction. This may be the case in a buy-back transaction in which, for example, a dispute as to the quality of the counter-export goods manufactured by equipment supplied under the export contract is related to a dispute as to the quality of that equipment. Similarly, in a direct offset transaction, in which the goods supplied in one direction are incorporated into the goods supplied in the other direction, a dispute as to the quality or timeliness of delivery of the goods in one direction may be related to a dispute as to the quality or timeliness of delivery of the goods in the other direction. Another situation in which related disputes may arise is when the countertrade agreement establishes a linked payment mechanism through which proceeds generated by the shipment of

goods in one direction are to be used to pay for the shipment of goods in the other direction (see chapter IX, "Payment"). For example, when the importer, in accordance with the countertrade agreement, retains the proceeds of the export contract, a dispute as to the responsibility for a failure to conclude a counter-export contract may lead to a related dispute concerning the transfer of proceeds of the export contract to the exporter. When the countertrade agreement provides for the setoff of payment claims for supply contracts concluded in the two directions, a dispute as to settlement of imbalances may involve questions of fact or law pertaining to supply contracts in either direction. Yet another situation in which related disputes may arise is when the countertrade agreement provides that a problem in the conclusion or performance of supply contracts in one direction is to have an effect on the obligations of the parties with respect to the conclusion or performance of supply contracts in the other direction (see chapter XIII, "Failure to complete countertrade transaction", paragraphs [38] to [60]).

50. [48] Disputes may arise in a countertrade transaction that involve or affect not only the exporter and the importer, but other parties as well, in particular third persons engaged in the transaction as purchasers and suppliers of countertrade goods (see above, paragraph 10). For example, when there is a dispute between the counter-exporter and the party originally committed to purchase as to whether liquidated damages are payable for a failure to purchase goods, a third-party purchaser engaged by the party originally committed to purchase those goods would have an interest in the dispute if a "hold-harmless" clause has been agreed upon between the third-party purchaser and the party originally committed to purchase (see chapter VIII, "Participation of third parties", paragraph [33]). Similarly, the party originally committed to purchase would be interested in the outcome of a dispute between a third-party purchaser and the counter-exporter if the party originally committed to purchase remains liable for the fulfilment of the countertrade commitment despite the engagement of the third-party purchaser. A further example of a multi-party dispute would be when both the party originally committed to purchase and the third-party purchaser are liable to the supplier for the fulfilment of the countertrade commitment and the supplier decides to pursue a claim against both of them.

51. [49] In the types of cases referred to in the preceding paragraph, it may be desirable to settle all related issues in the same dispute settlement proceedings. This could prevent inconsistent decisions, facilitate the taking of evidence, and reduce costs. However, multi-party proceedings tend to be more complicated and less manageable, and a party may find it more difficult to plan and present its case in such proceedings.

52. [49] Many legal systems provide a means for disputes involving several parties to be settled in the same multi-party judicial proceedings. In order to enable disputes involving several parties to be settled in multi-party judicial proceedings, it may be desirable for related contracts to contain a clause conferring exclusive jurisdiction on a court that has the power to conduct multi-party proceedings (see above, paragraphs 43 to 45). *

53. [new paragraph] Multi-party arbitration proceedings are usually possible only if all the participating parties conclude an arbitration agreement submitting their dispute to the same panel of arbitrators. The parties may wish to conclude such a multi-party arbitration agreement at the outset of the transaction, or they may decide to do so after the dispute has

arisen when the matters at issue indicate the usefulness of a multi-party arbitration. In some States, after a dispute has arisen, courts are able to assist the parties to implement the multi-party arbitration agreement by deciding procedural issues on which the parties cannot agree (e.g., the question whether an issue is covered by the multi-party arbitration clause, appointment of a single arbitral tribunal, or determination of the place of arbitration). There are also some States in which courts may, under certain conditions, order consolidation of two or more arbitral proceedings into a single arbitration even if not all the parties involved have agreed on the submission of the dispute to a single panel of arbitrators. However, it may be doubtful whether an award rendered in proceedings consolidated by a court order would be enforceable against a party that had not consented to those proceedings.

Notes

1/ Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 106 (also reproduced in Yearbook of the United Nations Commission on International Trade Law, vol. XI: 1980, part one, II, A (United Nations publication, Sales No. E.81.V.8)). The UNCITRAL Conciliation Rules have also been reproduced in booklet form (United Nations Publication, Sales No. E.81.V.6). Accompanying the Rules is a model conciliation clause, which reads: "Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force". The use of the UNCITRAL Conciliation Rules has been recommended by the United Nations General Assembly in its resolution 35/52 of 4 December 1980.

2/ United Nations, Treaties Series, vol. 330, p. 38, no. 4739 (1959).

3/ Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (1985), Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 332 and annex I (also reproduced in Yearbook of the United Nations Commission on International Trade Law, vol. XVI: 1985, part three, I (United Nations publication, Sales No. E.87.V.4)). The United Nations General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

4/ Report of the United Nations Commission on International Trade Law on the work of its ninth session (1976), Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), para. 57 (also reproduced in Yearbook of the United Nations Commission on International Trade Law, vol. VII: 1976, part one, II, A (United Nations publication, Sales No. E.77.V.6)). The use of the UNCITRAL Arbitration Rules has been recommended by the United Nations General Assembly in its resolution 31/98 of 15 December 1976.

5/ [new footnote] The following clause is recommended in the UNCITRAL Arbitration Rules: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note - Parties may wish to consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...".